

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
)	
)	
Petition for Forbearance of Fones4All Corp.)	
Pursuant to 47 U.S.C. § 160(c) and Section 1.53)	WC Docket No. 05-261
)	
)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
)	
Review of Section 215 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	

**COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTelecom)¹ urges the Federal Communications Commission (Commission) to deny Fones4All Corporation's Petition for Expedited Forbearance (the Petition) for two reasons. First, Fones4All Corporation (Fones4All) effectively asks the Commission to re-litigate the Triennial Review Remand Order (TRRO)² and, second, Fones4All asks the Commission to misuse its forbearance power to increase, rather than reduce, regulation on telecommunications carriers.

DISCUSSION

I. Fones4All Wants to Misuse the Forbearance Process to Gain Regulatory Favors Outside the Commission's Authority.

¹ USTelecom is the nation's leading trade association representing communications service providers and suppliers for the telecom industry. USTelecom's carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

² See *In the Matter of Unbundled Access to Network Elements* (WC Docket No. 04-313); *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338), Order on Remand, FCC 04-290 (rel. Feb. 4, 2005).

Fones4All seeks forbearance from application of Rule 51.319(d)³ as it applies to competitive local exchange carriers (CLECs) who use mass-market local switching as part of the unbundled network element platform (UNE-P) to provide residential service to Lifeline customers. Until it was significantly modified by the TRRO, Rule 51.319(d) required incumbent local exchange carriers (ILECs) to provide unbundling of mass-market switching. The Commission properly eliminated this requirement in the TRRO because the record showed that switches are widely deployed on a competitive basis in both major markets and small communities and that competitors such as cable and wireless companies are increasingly using their own switches in combination with their own loops to provide ubiquitous mass-market service.⁴ The record showed that CLECs that lease UNE-P furnish no facilities of their own but, rather, simply provide services over ILEC facilities, thereby engaging in what the D.C. Circuit has characterized as “completely synthetic competition.”⁵ Based on the record, the Commission correctly found that CLECs were not “impaired”⁶—that they can and do provide service without

³ 47 C.F.R. § 51.319(d).

⁴ See TRRO at ¶ 199. The Commission stated, “Applying the court’s guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide. We conclude, based on the record here, and the reasonable inferences we draw from it, that competitive LECs not only have deployed a significant, growing number of their own switches, often using new, more efficient technologies such as packet switches, but also that they are able to use those switches to serve the mass market in many areas, and that similar deployment is possible in other geographic markets.”

⁵ *USTA v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002).

⁶ See TRRO at ¶ 21, stating that a requesting carrier is impaired “when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic. See also TRRO at ¶ 22, clarifying that “when evaluating whether lack of access to an incumbent LEC network element ‘poses a barrier or barriers to entry . . . that

forced access to ILECs' facilities. Based on the record, therefore, Fones4All can compete using the same switching alternatives available to other providers of Lifeline service. The Commission should not reinstate the UNE-P regulation simply because the regulation made it easy for Fones4All and other CLECs like it to serve their customers.

Fones4All's forbearance request is a specious attempt to convince the Commission to revisit the TRRO and impose on ILECs regulations that were removed by that order. Rather than file a petition for reconsideration seeking new Commission regulation,⁷ Fones4All has asked the Commission to forbear from applying Rule 51.319(d) to CLECs who use UNE-P to provide Lifeline service as a means of reinstating the UNE-P regulation that it alleged it used to resell local telephone service to low-income customers. This request is illogical, however, because Fones4All is asking the Commission to provide forbearance from a rule that does not exist. Merriam-Webster's dictionary of law defines forbearance as "a refraining from the enforcement of something (that is a debt, right, or obligation) that is due." Rule 51.319(d) no longer contains an affirmative regulatory requirement that ILECs must provide unbundled elements identified in the Petition. There is, therefore, no regulation from which the Commission may forbear. While it might appear that Fones4All is proposing something akin to using a double negative in speech which, however incorrect grammatically, combines to form an affirmative statement, in fact, forbearance has no place in this proceeding because there is no rule, norm, requirement, or regulation at issue. Under the terms of the TRRO, ILECs are free from the

are likely to make entry into a market uneconomic,' we make that determination with regard to a reasonably efficient competition."

⁷ See 47 C.F.R. § 1.429. A Petition for Reconsideration of the TRRO would have been due within 30 days from the release of the TRRO on February 4, 2005. A search of the Commission's records reveals no such petition was filed by Fones4All.

UNE-P requirement. It is not the place of the Commission or any other regulatory body to “forbear” this freedom. To do so would be to re-regulate in a manner specifically determined in the TRRO to no longer be necessary. No ILEC is now required to unbundle the elements in question. A grant of forbearance would not and could not require a carrier to do so. Put simply, then, there are no unbundling obligations from which to forbear.

II. Even if it Were Logically Consistent With Forbearance, the Petition Fails to Satisfy the Requirements of Section 10(a) of the 1996 Act.

In addition to being nonsensical, Fones4All’s forbearance request is inconsistent with Congressional intent to relax regulatory burdens on telecommunications providers. Congress passed the Telecommunications Act of 1996 (1996 Act) to “promote competition and reduce regulation” in telecommunications markets. Furthermore, section 10(a)⁸ of the 1996 Act is intended to limit telecommunications regulation rather than to increase it. The language of section 10(a) clearly is intended to limit telecommunications regulation. It requires the Commission to forbear from applying any regulation to a telecommunications carrier if it determines that –

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

Section 10(a) allows the Commission to forbear from applying its rules when it can be shown that such provisions are no longer necessary or in the public interest. It does not

⁸ 47 U.S.C. § 160(a).

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permit the Commission to subvert the 1996 Act's deregulatory purposes by reinstating provisions that have been held repeatedly by the federal courts to be unnecessary.

Fones4All's request is a fundamentally regulatory request that would unnecessarily impose new regulatory obligations, rather than remove them. As such, the request cannot satisfy the basic requirements of section 10(a) of the 1996 Act and, therefore, must be denied.

CONCLUSION

Because forbearance from rules that do not require ILECs to provide UNE-P cannot reinstate UNE-P obligations and because forbearance should not be used to increase regulation on telecommunications providers, the Commission should deny the Petition.

Respectfully Submitted,

UNITED STATES TELECOM ASSOCIATION



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